Supreme Court, U.S.
FILED
DEC 20 2001
OFFICE OF THE CLERK

No. 01-706

In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEANNE SPRIETSMA, DECEASED, PETITIONER

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION, RESPONDENT.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

DONALD F. IVANSEK
SANDRA E. KUPELIAN*
Cassiday, Shade & Gloor
20 North Wacker Drive
Suite 1040
Chicago, IL 60606
(312) 641-3100

**Counsel of Record*

Counsel for Respondent Mercury Marine

QUESTION PRESENTED

Whether the Illinois Supreme Court correctly applied this Court's preemption precedents, including *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), and *United States* v. *Locke*, U.S. 89 (2000), in holding that the Federal Boat Safety Act preempts common law claims asserting that recreational boat motors must be equipped with "propeller guards," where the Coast Guard expressly rejected such a requirement after extensive administrative proceedings.

RULES 29.6 AND 14.1 STATEMENT

Respondent is Mercury Marine, an unincorporated division of Brunswick Corporation. Brunswick Corporation has no parent company, and no publicly held company owns 10% or more of Brunswick's stock.

Petitioner is Rex R. Sprietsma, administrator of the estate of Jeanne Sprietsma, deceased.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULES 29.6 AND 14.1 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

A. The Federal Boat Safety Act 2

B. Preemption Under The Federal Boat Safety Act 3

C. The Federal Boat Safety Act's "Savings Provision" 5

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required 5

1. The Coast Guard's study of propeller guards 6

2. The Subcommittee's makeup and methodology 6

3. The Subcommittee's study of propeller guards 7

4. The Subcommittee's conclusions 8

5. The Coast Guard's adoption of the Subcommittee's Report and Recommendations 10

D. The Proceedings Below 11

REASONS FOR DENYING THE PETITION 13

I. THE PETITION FAILS TO SATISFY ANY OF THE CRITERIA FOR A GRANT OF CERTIORARI 14

A. This Court's Recent Decisions Have Resolved The Legal Issues Left Undecided In *Lewis* v. *Brunswick Corporation* 14

B. The Lower Courts Are Not Divided Over The Issue Of BSA Preemption Of Propeller Guard Claims 17

C. The Decision Below Is Fully Consistent With The Decisions Of This Court. 20

II. THIS CASE IS NOT A PROPER VEHICLE TO RESOLVE THE QUESTION PRESENTED ... 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page**

Allen v. *Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) 28

Arkansas Elec. Coop. Corp. v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) 26

Beech v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991) 28

Bethlehem Steel Co. v. *New York State Labor Relations Bd.*, 330 U.S. 767 (1947) 26

Bonito Boats, Inc. v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) 26

Carstensen v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995) 17

Collins v. *Miller*, 252 U.S. 364 (1920) 29

Davis v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993) 17

Elliott v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990) 28, 30

Farner v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992) 17

Fidelity Fed. Sav. & Loan v. *de la Cuesta*, 458 U.S. 141 (1982) 23

Fitzpatrick v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993) 28

Flynt v. *Ohio*, 451 U.S. 619 (1981) 29

Foremost Ins. Co. v. *Richardson*, 457 U.S. 668 (1982) 22, 23

TABLE OF AUTHORITIES-Continued

Page

Foust v. *Munson S.S. Lines*, 299 U.S. 77 (1936) 20

Free v. *Bland*, 369 U.S. 663 (1962) 23

Freightliner Corp. v. *Myrick*, 514 U.S. 280 (1995) 17, 18, 21, 22, 23, 25

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) ..... *passim*

Hunt v. *Blasius*, 384 N.E.2d 368 (Ill. 1978) 27

Jarke v. *Jackson Products*, 631 N.E.2d 233 (Ill. App. 1994) 27

Lady v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001) .. *passim*

Lamkin v. *Towner*, 563 N.E.2d 449 (Ill. 1990) 27

Lewis v. *Brunswick Corp.*, 523 U.S. 1113 (1998) ... *passim*

Miller v. *Dvornik*, 501 N.E.2d 160 (Ill. App. 1986) 27

Moore v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994) 17, 18, 19, 20

Moss v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996) 17

Mowery v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991) 17

Parker v. *Outboard Marine Corp.*, No. J90-0011(L) (S.D. Miss. Feb. 28, 1991) 17

Pree v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993) ... 28

TABLE OF AUTHORITIES-Continued

Page

Puerto Rico Dep't of Consumer Affairs v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988) 26

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 12, 26

Republic Natural Gas Co. v. *Oklahoma*, 334 U.S. 62 (1948) 29

Ryan v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997) 17

Scoby v. *Vulcan-Hart Corp.*, 569 N.E.2d 1147 (Ill. App. 1991) 27

Shield v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993) 17

Shields v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991) 17, 28

Todd v. *Societe BIC, S.A.*, 21 F.3d 1402 (7th Cir. 1994) ... 27

United States v. *Locke*, 529 U.S. 89 (2000) ..... *passim*

Veal v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991) 28

Worthy v. *Collagen Corp.*, 967 S.W.2d 360 (Tex. 1998) .. 19

TABLE OF AUTHORITIES-Continued

Page

Statutes and Regulations:

Pub. L. No. 92-75, 85 Stat. 213:

§ 2 2
§ 17-24 2
§ 25-33 3

28 U.S.C. § 1257 1

28 U.S.C. § 1257(a) 29

46 U.S.C. §§ 4301-4311 2

46 U.S.C § 4301(a) 12, 23

46 U.S.C. § 4302(a) 3

46 U.S.C. § 4302(c)(4) 3, 6

46 U.S.C. § 4306 ..... 5, 11

46 U.S.C. § 4311(g) 5, 24

46 U.S.C. § 13110 3

46 U.S.C. § 13110(a) 3

46 U.S.C. § 13110(b)(1) 3

33 C.F.R. Chap. I, Subchap. S 5

33 C.F.R. Part 175 5

33 C.F.R. § 179.11 6

33 C.F.R. § 181.7 6

TABLE OF AUTHORITIES-Continued

Page

33 C.F.R. § 181.15 6

33 C.F.R. Part 183 5

33 C.F.R. § 183.53 6

49 C.F.R. § 1.46(n)(1) 2

Miscellaneous:

3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (15th ed. rev. 2001) 20

117 Cong. Rec. 28036 (1971) 5

36 Fed. Reg. 15764 (Aug. 18, 1971) 11, 25

38 Fed. Reg. 6914 (Mar. 14, 1973) 11, 25

53 Fed. Reg. 33210 (Aug. 30, 1988) 7

53 Fed. Reg. 43069 (Oct. 25, 1988) 7

53 Fed. Reg. 43070 (Oct. 25, 1988) 7

54 Fed. Reg. 15066 (Apr. 14, 1989) 7

54 Fed. Reg. 15068 (Apr. 14, 1989) 7

54 Fed. Reg. 42138 (Oct. 13, 1989) 7

60 Fed. Reg. 25191 (May 11, 1995) 10

61 Fed. Reg. 13123 (Mar. 26, 1996) 10, 11, 25

61 Fed. Reg. 13125 (Mar. 26, 1996) 11, 25

TABLE OF AUTHORITIES-Continued

Page

62 Fed. Reg. 22991 (Apr. 28, 1997) 10

65 Fed. Reg. 23144 (Apr. 24, 2000) 10

65 Fed. Reg. 23148 (Apr. 24, 2000) 10

H.R. Rep. No. 92-324 (1971) 2, 4, 5

National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) 4

Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) 2, 4

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) ..... *passim*

RESTATEMENT (SECOND) OF TORTS § 402A (1965) 27

S. Rep. No. 92-248 (1971) ..... *passim*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1-22) is reported at 757 N.E.2d 75 (Ill. 2001). The opinion of the Illinois Appellate Court (Pet. App. 23-38) is reported at 729 N.E.2d 45 (Ill. App. 2000). The order of the Circuit Court of Cook County (Nov. 20, 1998) (Pet. App. 39) is unreported.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257. As explained below, however, there is a question about the Court's jurisdiction in this case. See *infra* pp. 29-30.

STATEMENT OF THE CASE

The petition rests almost entirely on the claim that this Court should resolve the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which was dismissed before a decision on the merits. 523 U.S. 1113 (1998). But the principal legal issues raised here were definitively resolved two Terms ago in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000)—which involved a law that petitioner has acknowledged is "nearly identical" to the law at issue here, and which the court below carefully applied in reaching its decision.

No post-*Geier* decision conflicts with the ruling below. The nine federal courts to address the issue (both before and after *Geier*) have unanimously held that "propeller guard" claims are preempted by the Boat Safety Act. The only contrary decision —a 1994 state court ruling—rests on reasoning that has been repudiated by several recent decisions of this Court, including *Geier* and *United States* v. *Locke*, 529 U.S. 89 (2000). Thus, the petition is nothing more than a quarrel with the application of settled law to this particular case. There is no genuine conflict among the lower courts, and it will be time enough to address the issue if and when a conflict arises.

This Court's denial of certiorari only six months ago in *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), a case presenting the same issue in a nearly identical petition submitted by the same counsel, confirms that this is not a certworthy case. There is no justification for a different disposition here.

A. The Federal Boat Safety Act

Congress enacted the Federal Boat Safety Act ("BSA"), 46 U.S.C. §§ 4301-4311, to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve those goals by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.*

Prior to the BSA, the federal laws governing boat safety did "not meet current requirements of safe boating." H.R. Rep. No. 92-324, at 9 (1971) ("H.R. Rep."). The Motorboat Act of 1940 imposed limited safety requirements "such as life preservers [and] fire extinguishers." S. Rep. No. 92-248, at 13 (1971) ("S. Rep."). The Boating Act of 1958 was narrower—"primarily a boat numbering statute." H.R. Rep. at 9. Congress thus established a more comprehensive and "coordinated national boating safety program"—the BSA. S. Rep. at 1, 13.

The BSA has three principal components. First, it establishes "a standard numbering system for vessels" that is administered by the Coast Guard. Pub. L. No. 92-75, §§ 17-24, 85 Stat. at 220-222; *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 57 (1970) ("H. Hearings") (statement of Rear Admiral Joseph J. McClelland, U.S. Coast Guard).[1]

[1] The statute vests implementing authority in the Secretary of Transportation, who has delegated his functions to the Coast Guard. 49 C.F.R. § 1.46(n)(1).

Second, "to encourage greater State participation and consistency in boating safety efforts, and particularly greater safety patrol and enforcement activities," the BSA establishes "State boating safety programs" under the auspices of the Coast Guard. Pub. L. No. 92-75, §§ 25-33, 85 Stat. at 222-226.

Third, and most important, the Act mandates comprehensive federal design standards for boats and associated equipment (including motors). The Act directs the Coast Guard to prescribe regulations (46 U.S.C. § 4302(a)):

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard—
> (A) meeting the need for recreational vessel safety; and
> (B) being stated, insofar as practicable, in terms of performance * * * .

In considering whether to adopt a manufacturing standard, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("NBSAC" or "Council"). 46 U.S.C. §§ 4302(c)(4), 13110. The Council's 21 members, all of whom are appointed by the Secretary of Transportation, must have expertise in recreational boating safety and must represent three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of boat manufacturers; and (c) seven representatives of national boating organizations and the general public. *Id.* § 13110(a), (b)(1).

B. Preemption Under The Federal Boat Safety Act

The BSA grants the Coast Guard plenary authority to require that manufacturers comply with its "national construction and performance standards for boats and associated equipment." S. Rep. at 15. Because of their effect on interstate and maritime commerce, Congress was particularly concerned that any such manufacturing requirements be nationally uniform: "The need

for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." *Id.* at 14. Accord H.R. Rep. at 29; see H. Hearings at 61 ("several States are developing requirements of their own in law[s] which are varied and it is quite important both for the convenience of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country") (statement of Rear Admiral McClelland). As Representative Monagan explained: "A proliferation of dissimilar standards would give the manufacturer * * * an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now." *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 101 (1971) ("S. Hearing").

Congress also recognized that maritime safety traditionally has been an area where federal regulation predominates. As the Senate Report states: "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20.

These considerations led Congress to draft the BSA's preemption clause in broad and inclusive terms:

> Unless permitted by the [Coast Guard] under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions

> or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. The Act thus insures that boat manufacturers are not subject to "compliance with widely varying local requirements." S. Rep. at 20. By mandating that any state laws, regulations, or requirements be "identical" to some regulation issued by the Coast Guard, the preemption clause "preempts the field on boating standards or regulations." H.R. Rep. at 11.

C. The Federal Boat Safety Act's "Savings Provision"

Late in the course of Congress's consideration of the BSA, the Senate Commerce Committee added a "Savings Provision" to the bill. See S. Rep. at 31. "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter," this provision states, "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

The only recorded discussion of this provision in the House was a brief colloquy on the floor, in which Representative Grover described it as a "technical amendmen[t] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. 28036 (1971). The Senate's "technical" amendment "was concurred in" by the House, and the Act was adopted. *Ibid.*

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required

The Coast Guard has promulgated a host of federal boat and motor design standards. See 33 C.F.R. Chap. I, Subchap. S. In particular, it has adopted numerous "Equipment Requirements," including design standards for boat motors, flotation materials, electrical and fuel systems, personal flotation devices, distress signals, and ventilation systems. See *id.* Parts 175 (Subparts B-D), 183 (Subparts D-L). For example, the Coast Guard regulates the "safe powering" and "maximum horsepower capacity" of boats, the "placement" of outboard motors, and the "quick turn"

capability of boats equipped with such motors. *Id.* § 183.53 (boats must be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle setting" at "maximum throttle"). The Coast Guard also has authority to notify manufacturers of product defects, and manufacturers must certify that their products comply with all federal design standards. *Id.* §§ 179.11, 181.7, 181.15.

1. The Coast Guard's study of propeller guards

In 1988, the Coast Guard considered whether to require manufacturers to install propeller guards on their boat motors. As required by 46 U.S.C. § 4302(c)(4), the Coast Guard consulted with the NBSAC and directed it to:

- "Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water."
- "Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public."

NBSAC, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) ("Report"), Appendix A (Ill. App. A29). The NBSAC in turn appointed a subcommittee to "review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and the "[f]easibility of some form of mechanical guard or other action to prevent such contact." *Id.* at A2.

2. The Subcommittee's makeup and methodology

The Subcommittee comprised representatives of every interested constituency—state boat safety officials, industry representatives, members of recreational boating groups, and members of the general public. Ill. App. A55. Throughout its

study, it invited oral and written participation from others by publishing notices of its proceedings in the Federal Register.[2]

Over an 18-month period, the Subcommittee heard from a wide range of interested parties—designers of propeller guards, accident victims and their attorneys, marine engineers, naval architects, academics, industry representatives, and medical doctors. It conducted a "comprehensive" review of the "documentation, materials and information" about propeller-related injuries, including videos, journal articles, patents, on-water test data, and statistics pertaining to the causes of boating accidents. It held public meetings across the country, and it conducted its own on-water tests, where members were given opportunity to drive boats both equipped and unequipped with propeller guards. Ill. App. A2-A5, A34-A39, A41-A43.

3. The Subcommittee's study of propeller guards

The Subcommittee carefully studied each of the "three basic configurations of 'propeller guards'": (1) ring-type guards, (2) screen- or cage-type guards, and (3) nozzle-type guards. Ill. App. A13-A14. Observing that a propeller guard requirement "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them," it stated that "[f]easibility" was an "important questio[n] before the Subcommittee." *Id.* at A6.

---

[2] See, *e.g.*, 53 Fed. Reg. 33210 (Aug. 30, 1988) (public notice of Propeller Guard Subcommittee meeting on Sept. 22-23, 1988, stating that the meeting "is open to the public" and inviting "oral" or "written statement[s]"); *id.* at 43070 (Oct. 25, 1988) (same for Subcommittee meeting on Nov. 14, 1988); *id.* at 43069 (same for NBSAC meeting on Nov. 15-16, 1988); 54 Fed. Reg. 15068 (Apr. 14, 1989) (same for Subcommittee meeting on May 13, 1989 to "[d]iscuss the pros and cons of Propeller Guards"); *id.* at 15066 (same for NBSAC meeting on May 11-12, 1989); *id.* at 42138 (Oct. 13, 1989) (same for Subcommittee meeting on Nov. 4, 1989); *ibid.* (same for NBSAC meeting on Nov. 6-7, 1989).

Ring-type guards consist of a circular band surrounding the motor's propeller to prevent contact from the propeller's side. Ill. App. A15. However, the Subcommittee found that "the ring-type guard creates severe steering and trim effects which cause serious safety and control problems." *Id.* at A17. In on-water tests, for example, "the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result." *Ibid.* Moreover, ring-type guards create "a new hazard"—"an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller." *Id.* at A21-A22.

Cage- or mask-type guards consist of "a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires." Ill. App. A14. The Subcommittee, however, found that such guards are only feasible for use on slow-moving "rescue boats" or "amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible," and where "a blow to a person in the water" has "minimal effects." "No evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." *Id.* at A16.

Nozzle-type guards surround the propeller with "a tunnel or tube" and are designed "to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships." But "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." Ill. App. A14, A16.

4. The Subcommittee's conclusions

Based on the available data, the Subcommittee conducted a cost-benefit analysis of propeller guards, explaining that any "technologically feasible safety featur[e]" must "minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard; (b) materially

interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk." Ill. App. A21. The Subcommittee flatly rejected the "assert[ion] that propeller guard technology and/or availability meets the foregoing criteria." *Ibid.* Rather, it found "that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades." Pet. App. 3.

The Subcommittee thus concluded that "propeller guarding at best could have only a negligible impact on improving boating safety," and that "[o]perators of a 'guard-equipped' boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage." Ill. App. A22, A24. As stated in the Report's conclusions:

> The development and use of devices such as "propeller guards" can * * * be counter-productive and can create new hazards of equal or greater consequence. * * * [T]here are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at A24-A25. The Subcommittee accordingly recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards," but rather should focus on efforts such as "awareness campaigns" regarding "hazards associated with careless or negligent boat operation." *Id.* at A25. There were no "minority or dissenting statements." *Id.* at A2.

5. The Coast Guard's adoption of the Subcommittee's Report and Recommendations

The 21-member NBSAC and the Coast Guard *unanimously* adopted all of the Subcommittee's recommendations. Ill. App. A74; *id.* at A274 ("All of the report's recommendations are accepted" and "will be implemented"). In conformity with the Council's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard expressly determined that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." *Id.* at A25, A274 (emphasis added). In addition to the accident data, the Coast Guard cited "economic" and "feasib[ility]" concerns as grounds for rejecting a propeller guard requirement. *Ibid.*

The Coast Guard noted that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices." Ill. App. A274. However, despite several instances in which the Coast Guard has invited the public to submit information regarding the feasibility of fitting *other* types of boats with propeller guards (*e.g.*, houseboats), it has never altered its conclusions regarding high-speed recreational boats.[3] Nor has it issued any regulation requiring any boat to be equipped with such a guard or permitting the States to adopt such a requirement. To the contrary, in one recent notice of proposed rulemaking, it reiterated that "[u]nder

[3] In 1995, the Coast Guard issued a Notice and Request for Comments on "the public's present feelings about the use of propeller guards" on "houseboats." 60 Fed. Reg. 25191 (May 11, 1995). In 1996, it issued an Advance Notice of Proposed Rulemaking "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13123 (Mar. 26, 1996); see also 62 Fed. Reg. 22991 (Apr. 28, 1997) (soliciting comments on the effectiveness of specific devices that have been suggested for reducing the number of accidents involving propellers of rented boats). The Coast Guard has received "very general" comments in response to its 1995 notice. 65 Fed. Reg. 23144, 23148 (Apr. 24, 2000).

current Federal statutes (46 U.S.C. 4306), the States *do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction.*" 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) (emphasis added). The Coast Guard has held this view since the Act's adoption. See 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973).

D. The Proceedings Below

The complaint alleges that on July 10, 1995, while boating in Tennessee, Jeanne Sprietsma "was caused to fall from the boat" in which she was riding as a passenger. Ill. App. A278. Ms. Sprietsma, a 41-year-old woman, allegedly was struck by the boat motor's propeller and sustained injuries resulting in death. The engine was a 115-horsepower outboard motor manufactured by Mercury Marine in 1988, equipped with a traditional propeller. *Id.* at A289-A290.

The accident occurred in the Mitchell Creek portion of Dale Hollow Lake, a major interstate body of water that spans the Kentucky-Tennessee border. Ill. App. A278. The lake was created by a federal dam built by the U.S. Army Corps of Engineers pursuant to the Flood Control Act of 1938 and the Rivers and Harbors Act of 1946. It covers some 935 square miles and has more than 600 miles of shoreline, as well as seven federal recreation areas, 14 commercial marinas, and dozens of lodges, motels, and campgrounds. See generally http://www.lrn.usace.army.mil/op/DAL/rec/ (visited Dec. 4, 2001).

Rex Sprietsma later filed this suit against Mercury Marine and Ebbtide Corporation, the boat's manufacturer. Asserting theories of strict liability and negligence, he alleged that the boat's motor was defectively designed because it lacked a "propeller guard" that would have prevented Ms. Sprietsma's death. Ill. App. A277-A285. He also alleged that the boat, a 1988 Ebbtide ski boat, was defective because it "[a]llowed for

open bow seating to the very front edge of the bow," lacked "sufficient back support in the seating" or "any substantial form of rail or guard to obstruct a fall out of the boat," and failed to warn of these risks. *Id.* at A286.

Mercury Marine moved to dismiss the complaint, contending that the claims against it were preempted by the BSA. The Cook County Circuit Court granted the motion. Noting that the Coast Guard's "consideration of the propeller guard regulation or the lack thereof was substantial and within the guidelines set forth by [the BSA]," it held that the Coast Guard's decision not to require propeller guards impliedly preempted tort claims that would impose such a requirement. Ill. App. A292-A293, A295. The Appellate Court unanimously affirmed, observing that "every federal court to have considered the issue" has held that the BSA preempts propeller guard claims. Pet. App. 38.

In a detailed opinion that carefully canvassed governing Supreme Court precedents, the Illinois Supreme Court affirmed the lower courts' decisions. The court began by noting that the BSA, which applies to recreational boats operated "on waters subject to the jurisdiction of the United States" (46 U.S.C. § 4301(a)), is predicated on the "federal maritime jurisdiction." Pet. App. 5-6. Because propeller guard claims "bear upon an area historically regulated by the federal government," the court stated, "'an assumption of nonpre-emption is not triggered.'" *Ibid.* (quoting *Locke*, 529 U.S. at 108).

The court went on to hold that petitioner's claims were impliedly preempted under a long line of this Court's decisions, including *Geier*, *Locke*, and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Pet. App. 12-17. Quoting this Court's holding in numerous cases that "'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate,'" the court concluded (Pet. App. 13, 15-16):

> [T]he Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA.

The court was also persuaded by the reasoning of *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 615 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), which held that "'where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.'" Pet. App. 18-19.[4]

REASONS FOR DENYING THE PETITION

The petition satisfies none of this Court's criteria for a grant of certiorari. Its central theme is that this Court should take its "first meaningful opportunity" (Pet. 11) to address the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which settled before decision. But the issues raised in *Lewis* (and in this case) have been resolved by intervening decisions of this Court, including *Geier* and *Locke*. The court below carefully applied those precedents in concluding that the Coast Guard's considered decision regarding propeller guards has preemptive force, and nine other federal courts—including the only other post-*Geier* case—have unanimously reached the same result.

---

[4] The court further held that petitioner had waived his various arguments concerning the date of manufacture of the motor in question and accordingly did not address them. Pet. App. 19.

See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001). Thus, the petition presents nothing more than a disagreement over the application of this Court's recent decisions to the facts of this particular case, which is not worthy of a grant of certiorari. See Rule 10. There will be other opportunities to review the issue should a conflict arise in the future.

Moreover, several other prudential considerations warrant a denial of certiorari. The decision below is of no practical importance because petitioner could not recover under Illinois law even if his tort claim were allowed to go forward. In addition, this case arose in state court and part of the proceeding—petitioner's claim against Ebbtide Corporation, the boat's manufacturer—is still pending. It thus appears that the decision below is not final as to all parties. Finally, the decision below is fully consistent with this Court's preemption rulings, with the federal interest in uniform design requirements for boats in interstate commerce, and with the public interest in boat safety. There is no ground for further review.

I. THE PETITION FAILS TO SATISFY ANY OF THE CRITERIA FOR A GRANT OF CERTIORARI.

A. This Court's Recent Decisions Have Resolved The Legal Issues Left Undecided In *Lewis* v. *Brunswick Corporation*.

Petitioner's principal argument for certiorari is the claim that "[t]his case involves the same issue raised by *Lewis* v. *Brunswick Corp.*, No. 97-288," which settled before a decision on the merits. Pet. i. Because this Court granted review in *Lewis*, the argument goes, it should grant review here as well.

Lewis presented two related questions: first, whether "it is constitutionally permissible to imply the federal pre-emption of state common law claims" when a statute contains both express preemption and savings clauses; and second, whether "torts of

omission [can be] impliedly preempted" under a statute that contains a savings clause. Pet. i in No. 97-288.

This Court answered both of these questions in *Geier*. As to whether implied preemption principles apply to laws containing both express preemption and savings clauses, *Geier* expressly held that such provisions "do[] *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869. And as to whether a "tort of omission" can be impliedly pre-empted in the face of a savings clause, *Geier* itself involved such a tort—a "failure to install" claim—yet the Court held that allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to impose such a requirement. *Id.* at 881. That a case involves a "failure to install" claim does not alter this Court's analysis: the inquiry remains whether the claim "actually conflicts" with the federal regulatory scheme, either by making it "'impossible' for private parties to comply with both state and federal law," or by "frustrat[ing] the accomplishment of a federal objective." *Id.* at 873.

Petitioner attempts to discount *Geier* as "narrowly confined to the particular regulation at issue." Pet. 24. In the court below, however, he argued vehemently that the statutory provisions at issue in *Geier* and those at issue here were "nearly identical." Pet. 5 in Ill. No. 89492. Moreover, he sought review in the Illinois Supreme Court on the basis of this Court's pending decision in *Geier* (*id.* at 4-5, 17), and most of his merits brief below was devoted to arguments concerning *Geier*.

The court below faithfully applied *Geier* in holding that a jury verdict imposing a duty to install propeller guards would "present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the FBSA." Pet. App. 16. Petitioner's disagreement with the lower court's application of these "ordinary pre-emption principles, grounded in longstanding precedent" (*Geier*, 529 U.S. at 874), does not warrant a grant of certiorari.

Any remaining issue presented in *Lewis* was disposed of in *Locke*, which addressed the preemptive effect of Coast Guard decisions concerning the design and construction of maritime vessels. Specifically, petitioner complains that the court below entered uncharted waters in holding that a federal decision not to regulate can have preemptive effect in the "absence of any federal regulation." Pet. 20. But *Locke* unanimously reaffirmed that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority," citing this Court's repeated holdings that "'where failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." 529 U.S. at 99, 110 (citations omitted). As the Court in *Locke* stated in reference to the Coast Guard: "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Id.* at 111.

As with *Geier*, the court below carefully analyzed *Locke* in rendering its opinion. It explained that "'the relevant inquiry for * * * pre-emption'" is "'whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all'" and concluded that the Coast Guard's "informed decision that no regulatory action should be taken to require propeller guards" "equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA." Pet. App. 15-16 (quoting *Locke*, 529 U.S. at 110). Here again, petitioner dislikes this application of settled precedent, but there is no reason to review an application of principles that this Court laid down just two Terms ago—especially under a statutory scheme that petitioner concedes is "nearly identical" to that in *Geier*. If a conflict arises in the future, this Court can address the issue at that time.

B. The Lower Courts Are Not Divided Over The Issue Of BSA Preemption Of Propeller Guard Claims.

Petitioner next argues that review is necessary to resolve a "direct conflict" among the lower courts. Pet. 3. He concedes (at 11) that "a host" of courts have held that the BSA preempts propeller guard claims—indeed, the decision below accords with that of *every* federal court and several state courts to address the issue[5]—but asserts that the decision below conflicts with one 1994 state court decision, *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994).

Contrary to petitioner's claim, there is no genuine conflict. To begin with, the court in *Moore*, like the lower court here, rejected the contention that the BSA expressly preempts propeller guard claims, 889 S.W.2d at 249-251, and petitioner himself notes that the decisions are in agreement on that score. Pet. 13-14.

As for implied preemption, the reasoning of *Moore* has been overtaken by that of *Geier* and this Court's other recent preemption rulings. *Moore* held that the presence of an express preemption clause precluded a finding of implied preemption. 889 S.W.2d at 251 n.10. But that view was decisively rejected in *Geier*, which found conflict preemption in the face of a similar provision. 529 U.S. at 869 (an express preemption provision "does *not* bar the ordinary working of conflict preemption principles"); see also *Freightliner Corp.* v. *Myrick*,

---

[5] See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000); *Lewis* v. *Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997); *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Marine Corp.*, No. J90-0011(L) slip. op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992).

514 U.S. 280, 287 (1995) (rejecting the Eleventh Circuit's view "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute").[6]

Similarly, the *Moore* court was of the view that the BSA's savings clause indicated Congress's intent to preserve even common law claims that were in "tension" with federal policy. 889 S.W.2d at 252. But *Geier* rejected the view that a savings clause may be interpreted "to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act." 529 U.S. at 870.

Likewise, *Moore* reasoned that "damage awards" are "not equivalent to * * * positive enactments," since "a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer—installing guards on future boats or taking no action and bearing the liability as a cost of doing business." 889 S.W.2d at 251. *Geier*, by contrast, held that "rules of law that judges and juries create or apply" in tort suits may remove a manufacturing choice that federal regulators intended to preserve. 529 U.S. at 871.

Finally, *Moore* applied a presumption against preemption, reasoning that the lawsuit implicated the safety of boats "on [Texas's] waterways." 889 S.W.2d at 251. *Locke*, however, made clear that no such presumption applies to the regulation of "maritime commerce" (529 U.S. at 108); the accident here occurred on an interstate body of navigable water (see *supra* p.11); and Congress relied upon its "historic maritime jurisdiction" in enacting the BSA. S. Rep. at 17; see *id.* at 20 (citing "the long history of preemption in maritime safety matters" and "the need for uniformity applicable to vessels moving in

[6] Indeed, the *Moore* court cited the Eleventh Circuit's decision in *Myrick* for the proposition that the presence of an express preemption clause foreclosed any implied preemption analysis. See 889 S.W.2d at 251 n.10. As shown in the text, however, this Court expressly repudiated that aspect of the Eleventh Circuit's reasoning when the case came before it on certiorari.

interstate commerce"); see also *Geier*, 529 U.S. at 873 (declining to apply an "unusual, 'special burden' against pre-emption").

In sum, at every point in its reasoning, *Moore* adopted legal conclusions that have since been rejected by this Court's decisions. There is no reason to believe that the Texas Supreme Court would reach the same result today—especially when three justices dissented in *Moore* for reasons that this Court validated in *Geier* and *Locke*. See 889 S.W.2d at 252-257; *Worthy* v. *Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) ("We are also bound to follow the decisions of the United States Supreme Court, the final authority on federal preemption issues"). Thus, *Moore* does not give rise to any conflict with the decision below.

Apart from the decision below, the only other post-*Geier* case to address BSA preemption of propeller guard claims is *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000). Applying *Geier* and *Locke*, the court there held that allowing such claims to proceed "would present an obstacle to and frustrate the flexible approach towards propeller guards adopted by the Coast Guard." *Id.* at 614.

Like the court below, the Fifth Circuit in *Lady* rejected the argument that claims implicating "maritime commerce" are entitled to a "presumption against preemption." 228 F.3d at 607. Like the court below, it rejected the view that the BSA "expressly preempts" propeller guard claims. *Id* at 611. Like the court below, it rejected the argument of the Solicitor General in *Lewis*. *Id.* at 615 n.23. And like the court below, it rejected the contention that propeller guard claims are not preempted "as long as the Coast Guard has not promulgated a regulation that conflicts with the common-law requirement." *Id.* at 611-612. "Rather," the court held, "where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation

and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Id.* at 615. *Lady* is thus on all fours with the decision below.

Without dissent, this Court denied the petition for certiorari in *Lady*—which was an *almost verbatim* copy of the petition filed here, raising identical arguments. 121 S. Ct. 1402 (2001). The petitioner's counsel there (also counsel here) argued that there was a conflict between the Fifth Circuit's decision and *Moore*, and that review was needed "to finish the job started in *Lewis*." Pet. 15 in No. 00-1031. OMC responded that *Geier* resolved the question presented in *Lewis*, and that the Solicitor General's arguments in *Lewis* and the reasoning of *Moore* have been rejected by recent decisions. The only development since *Lady* is the decision below. Thus, every post-*Geier* decision has held that the BSA impliedly preempts propeller guard claims.[7]

C. The Decision Below Is Fully Consistent With The Decisions Of This Court.

Faced with the absence of any genuine conflict among the lower courts, petitioner resorts to the assertion that the decision below conflicts with this Court's precedents. Pet. 15-25. He

---

[7] Petitioner tries to divert attention from the denial of certiorari in *Lady* by noting that OMC filed a Chapter 11 bankruptcy petition shortly after Lady sought certiorari. Pet. 11-12. In his reply brief in support of certiorari (at 7-9), however, Lady (represented by petitioner's counsel here) vigorously argued that "OMC's bankruptcy is not a reason to deny the writ," since he could obtain relief from the stay and potentially recover a substantial amount on remand if he prevailed. That assertion was plainly correct. The fact that OMC was in reorganization proceedings does not mean that Lady would have been unable to pursue his tort claim. Bankruptcy courts routinely lift the automatic stay to permit a determination of the validity of a claim in other litigation, particularly where necessary to avoid loss of the entire claim. See 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (15th ed. rev. 2001); *Foust* v. *Munson S.S. Lines*, 299 U.S. 77 (1936) (district court abused its discretion in staying wrongful death suit against company involved in reorganization proceeding). A bankruptcy court would undoubtedly lift the stay to permit briefing and argument of a case in which this Court granted certiorari.

makes three such claims—that the decision is inconsistent with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); that it misapplied *Locke* in declining to apply a "presumption against preemption"; and that it failed to give sufficient weight to the Solicitor General's brief in *Lewis*. None of these arguments has merit.

Myrick involved a federal safety standard prescribing short stopping distances for semitrailers. The Ninth Circuit invalidated the standard on the ground that the National Highway Traffic Safety Administration ("NHTSA") had not considered the failure rate of anti-lock brake systems ("ABS"), which were needed to comply with the standard. 514 U.S. at 284-285. NHTSA thereafter amended the standard so that the distance and lock-up requirements no longer applied to semitrailers. *Id.* at 285.

The plaintiffs in *Myrick*, who were injured in accidents with trucks lacking ABS, claimed that "the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S. at 283. The defendants replied that the absence of any federal standard governing truck stopping distances evidenced an intent to leave the issue unregulated, thus impliedly preempting the plaintiffs' claims. This Court rejected that argument, however, explaining that "the lack of federal regulation *did not result from an affirmative decision of agency officials to refrain from regulating air brakes*." *Id.* at 286 (emphasis added).

In contrast to *Myrick*, this *is* a case where the absence of a federal regulation resulted from the agency's "affirmative decision to refrain" from regulating. As both the court below and the Fifth Circuit held: "'the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate.'" Pet. App. 12 (quoting *Lady*, 228 F.3d at 612).

Moreover, the plaintiffs in *Myrick* merely sought to impose a state-law duty that was effectively identical to the short-lived

federal regulation. NHTSA wanted to regulate truck stopping distances; it had specifically endorsed ABS; and it had imposed a rule that would have required trucks to install ABS, only to have a court declare it invalid. Here, by contrast, the Coast Guard affirmatively determined that propeller guards should *not* be required, and petitioner advocates a duty directly contrary to this judgment. Thus, *Myrick* is wholly inapposite—as the lower courts have consistently recognized. Pet. App. 11-12; *Lady*, 228 F.3d at 612; *Lewis*, 107 F.3d at 1503-1504.

Petitioner next argues that the court below, in not applying a presumption against preemption, "misrea[d] this Court's recent decision in *Locke*." Pet. 21. He claims that *Locke* is irrelevant because this case involves "*recreational* vessels" and "has nothing to do with maritime commerce," because the accident here took place in "state waters," and because *Locke* involved "international" issues and "ocean-going oil tankers." *Id.* at 20-21. These arguments are without foundation.

First, the fact that this case involves *recreational* boats does not mean it does not implicate *interstate commerce* and *federal waterways*. Pleasure boating is a multi-billion-dollar industry, manufacturers make pleasure boats for national markets, and such boats routinely cross state lines (as petitioner's boat did here). As Congress explained in adopting the Act at issue: federal preemption in this context "conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20; accord *id.* at 14 (citing "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded"). Thus, Congress fully understood that manufacturing standards for recreational boats directly affect interstate commerce. See also *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 675 (1982) ("[a] collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce").

Nor did this case arise in "state waters." As explained above (at 11), the accident here occurred in the Dale Hollow chain of lakes—a navigable and interstate body of water that crosses the Tennessee-Kentucky border and that was created by federal authorities acting under federal legislation. The "jurisdictional applicability" of the BSA extends to every recreational vessel "within the historic federal maritime jurisdiction—the navigable waters of the United States, [and] certain internal waters which are in the exclusive or concurrent jurisdiction of the United States." S. Rep. at 17. In sum, petitioner cannot plausibly claim that this accident occurred on state waters that are not "subject to the jurisdiction of the United States." 46 U.S.C. § 4301(a).

It makes no difference that *Locke* involved "international" concerns and "ocean-going oil tankers." Congress understood the BSA to be as closely related to maritime commerce as the Act at issue in *Locke*; the BSA applies as fully to boats on land-locked lakes as to those "on the high seas" (§ 4301(a)); and the federal government's paramount authority over maritime commerce does not depend on its being foreign or international in scope. *Foremost*, 457 U.S. at 674-677. As the Fifth Circuit explained in *Lady*: "any distinction between recreational vessels and tankers is of little significance, as the national interest in vessels operating on navigable waters of the United States encompasses both." 228 F.3d at 607.[8]

Moreover, even if petitioner's arguments regarding *Myrick* and *Locke* were correct (and they are not), they would represent nothing more than a quarrel over the Illinois Supreme Court's application of this Court's recent decisions to the particular

---

[8] It is well settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Fed. Sav. & Loan* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)).

facts of this case. Petitioner does not deny that a federal decision not to regulate can have preemptive force when it is based on an affirmative determination that the area is best left unregulated; he simply disagrees that this is such a case. Nor does he dispute that a "presumption against preemption" does not apply to regulation of maritime commerce; he simply disagrees that this case involves such commerce. These disagreements do not justify this Court's review. See Rule 10 ("misapplication of a properly stated rule of law" is an insufficient basis for certiorari).

Finally, petitioner says that the decision below disregarded precedent in not deferring to the Solicitor General's brief in *Lewis*, which argued that the BSA does not preempt propeller guard claims. Pet. 23-25. But as the court below explained:

> [A]rguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*. For example, the Solicitor General in the *Lewis* brief argued that the existence of the savings clause (section 4311(g)) "makes clear Congress's explicit intent to preserve tort liability." But the *Geier* Court found implied preemption in the presence of the savings clause and rejected the argument that this clause "bar[red] the ordinary working of conflict pre-emption principles."

Pet. App. 18; see *Lady*, 228 F.3d at 615 & n.23 (the Solicitor General's views in *Lewis* were not "sufficient to overcome the reasons supporting the application of implied preemption").

This is but one of the Solicitor General's arguments in *Lewis* that was rejected in *Geier*. For example, the *Lewis* brief states (at 27) that "a common law claim would be permitted even if a regulation were in existence unless that claim propounded a standard of conduct directly contrary to the federal rule." But *Geier* explained that the "full purposes" of federal law could be frustrated even absent such a direct conflict. 529 U.S. at 873.

Similarly, the brief (at 22) made much of the fact that the BSA's preemption provision did not reference common law claims, stating that "[t]he regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions." But as *Geier* observed in analyzing a similar provision: "rules of law that judges and juries create or apply in [state tort] suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." 529 U.S. at 871.

And the brief in *Lewis* argued (at 28) that "the absence of a federal regulation does not create a preemptive effect on state common law claims when the federal scheme is not intended to occupy the complete field of motorboat safety." But while the Court in *Geier* made no finding that the Act there "preempted the field," it readily concluded that the government's refusal to require airbags was a considered decision with preemptive force. See 529 U.S. at 874-883.

Furthermore, the Coast Guard did not sign the Solicitor General's brief in *Lewis*—in contrast to its practice in other preemption cases involving its jurisdiction. *E.g.*, U.S. Br. in *Locke* (No. 98-1701). And that brief acknowledged the Coast Guard's "longstanding interpretation" that the Act preempts state safety requirements "regardless of whether a federal standard is in existence." *Lewis* Br. 15-17. See 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) ("the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction"); 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973). Thus, it is not the case that the views set forth in the *Lewis* brief are "the United States' only articulated view on the matter." Pet. 10. But in any event, those views have been rejected by subsequent decisions of this Court.

The holding below is consistent not only with *Myrick*, *Locke*, and *Geier*, but also with a long line of this Court's precedents.

As the court below recognized (Pet. App. 13-15), it is well settled that a federal decision not to regulate has preemptive force where based on a considered study of the regulatory question. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989); *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). As the Court stated in the leading case in this area—involving the Coast Guard's authority—the "relevant inquiry" is "whether the Secretary has either promulgated his own [requirement] * * * or has decided that no such requirement should be imposed at all." *Ray*, 435 U.S. at 171-172. Accord *Locke*, 529 U.S. at 104, 107 (reaffirming *Ray*'s "essential framework," "analytic structure," and "holding"). There is no reason to review the Illinois Supreme Court's ruling that this is such a case.

It is hard to imagine a more compelling case for application of the principle recognized in these decisions. Pursuant to statutorily prescribed procedures, the Coast Guard conducted a painstaking, 18-month study of propeller guards. Its decision not to require them reflected not indifference, but a thorough analysis of the regulatory issues and a conclusion that they were technologically infeasible, economically unjustified, and likely to *increase* safety hazards. Ill. App. A24. As in *Geier*, the Coast Guard focused on a single item of equipment and made a "policy judgment that safety would best be promoted" if that item is *not* required. 529 U.S. at 881. And as in *Geier*, to allow "different juries in different States [to] reach different decisions" "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives" and override federal safety policies that were "deliberately imposed." *Id.* at 869, 871, 872. See also *id.* at 884 (rejecting the argument that "a formal agency statement of pre-emptive intent [i]s a prerequisite to concluding that a conflict

exists"); *Ray*, 435 U.S. at 178 (holding that the Coast Guard's "failure to promulgate a ban" on large oil tankers took on "the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute").

II. THIS CASE IS NOT A PROPER VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Quite apart from the petition's failure to satisfy the criteria of Rule 10, review is also unwarranted for various prudential reasons. To begin with, a decision here would be of no practical importance because petitioner could not recover under Illinois tort law even if his claim were allowed to proceed. In Illinois, a party alleging a design defect must satisfy § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), which imposes strict liability on makers of "unreasonably dangerous" products. See *Lamkin* v. *Towner*, 563 N.E.2d 449 (Ill. 1990). Time and again, Illinois courts have held that a product is not "unreasonably dangerous" if its risks "derive merely from those inherent properties * * * which are obvious to all who come in contact with [it]." *Hunt* v. *Blasius*, 384 N.E.2d 368, 372 (Ill. 1978).[9]

---

[9] See *Miller* v. *Dvornik*, 501 N.E.2d 160, 164 (Ill. App. 1986) (holding that a motorcycle is not defective for lack of crash bars and stating that "[i]t is well settled that injuries are not compensable if they are caused by inherent propensities of a product which are obvious to all who come into contact with them"); *Scoby* v. *Vulcan-Hart Corp.*, 569 N.E.2d 1147, 1151 (Ill. App. 1991) (holding that a deep fat fryer is not defective for lack of a protective cover and stating that "[c]onsidering not only the obvious nature of any danger here but, also, the simple nature of the mechanism involved, * * * summary judgment for the defendant was clearly proper"); *Jarke* v. *Jackson Products*, 631 N.E.2d 233, 238 (Ill. App. 1994) (holding that a welding mask was not unreasonably dangerous for failure to include an ear guard and stating that "the only pertinent inquiry is whether the product is unreasonably dangerous in the state in which it is used"); *Todd* v. *Societe BIC, S.A.*, 21 F.3d 1402, 1407 (7th Cir. 1994) (en banc) (holding that a cigarette lighter was not unreasonably dangerous for lack of a child-restraint device; stating that "[i]njuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product").

These holdings fully apply to a boat motor's propeller, the dangers of which are readily apparent to the ordinary consumer. Much as a chef must appreciate the dangers of a sharp knife, or a lumberjack the dangers of a saw's spinning chain, members of the boating public must appreciate the danger of an outboard motor's high-speed propeller blades—as numerous courts have held. *E.g.*, *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir. 1990) (reversing a verdict finding that a propeller was defective for lack of a guard on the basis that "products whose inherent danger is patent and obvious, do not, as a matter of law, involve defects of a sort that a jury should resolve," and explaining that "the ordinary consumer clearly understands that a revolving propeller involves danger").[10]

[10] In addition to *Elliott*, see *Fitzpatrick* v. *Madonna*, 623 A.2d 322, 324-325 (Pa. Super. Ct. 1993) (reversing a jury verdict for the plaintiff because "[a] competent person knows that he or she must stay clear of the churning blades of an outboard motor in the same way as a person avoids airplane propellers, chain saw teeth, and lawn mower blades," and because "it cannot be said with any degree of certainty that the risk of injury will be reduced by a safety guard"); *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867-868 (8th Cir. 1993) (unguarded propellers "[are] not dangerous beyond the expectations of the ordinary consumer" and "do not, as a matter of law, involve defects of a sort that a jury should resolve"); *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) (entering judgment for the manufacturer and citing the "absence of evidence that there was a feasible, safer alternative design for a propeller guard"); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1583 (M.D. Ga. 1991) ("a pleasure boat's unguarded propellers are not dangerous beyond the expectations of the ordinary consumer"; "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate"); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447, 449-450 (Ala. 1991) (finding no "jury issue" because "a propeller guard that arguably creates other dangers is not a safer design"); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188, 191 (Ala. 1991) (holding that "the trial court should not have submitted the [defective design] charge to the jury" and rejecting the claim "that because there were several patents available for propeller guards, Mercury Marine was negligent or wanton in failing to utilize them on its boats").

In light of this overwhelming body of authority, there is no substantial ground to doubt that Illinois courts would reject petitioner's claim as a matter of substantive tort law. It would thus be a waste of private and judicial resources to debate the preemption issue in this context.

Moreover, it is questionable whether this Court has jurisdiction in this matter. Under 28 U.S.C. § 1257(a), the Court may review federal issues arising from "[f]inal judgments or decrees rendered by the highest court of a State." In order to satisfy the finality requirement, the judgment from which review is sought must be final as to all parties and issues. See *Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981) (per curiam) ("the final-judgment rule has been interpreted 'to preclude reviewability where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State'"); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920) (the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action"); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948).

Petitioner, however, sued not only respondent, but Ebbtide Corporation, alleging that its boat was defectively designed because it lacked adequate handrails and failed to warn passengers of inadequate back support in the boat's seating. See *supra* p. 12. The Circuit Court granted respondent's motion to dismiss, and that decision was affirmed on appeal. Petitioner's claim against Ebbtide, however, is still pending.[11] A trial below may result in full relief (rendering the issue here moot), or it may raise other issues of federal law (*e.g.*, relating to punitive damages or other federal regulatory standards). In any event, the decision below did not resolve petitioner's claims against

[11] After the decision of the Illinois Supreme Court, the Circuit Court of Cook County reinstated petitioner's remaining claim against Ebbtide on its trial docket. See Order (Cook County Circuit Ct. No. 01L14400) (Dec. 4, 2001).

all parties, and the federal question presented here is not conclusive of the remaining proceedings below.

Finally, it merits emphasis that the decision below is fully consistent with the public interest in safe boating. After careful study, the Coast Guard determined not only that propeller guards were infeasible for any recreational speedboat, but also that they would give boaters a false sense of security and increase the occurrence of serious accidents. Numerous courts have held that speedboats are not defective for lack of propeller guards, citing "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate." *E.g.*, *Elliott*, 903 F.2d at 1509. Thus, the decision below accords with the public interest in ensuring that boats be as safe as possible.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD F. IVANSEK
SANDRA E. KUPELIAN*
Cassiday, Shade & Gloor
20 North Wacker Drive
Suite 1040
Chicago, IL 60606
(312) 641-3100

**Counsel of Record*

Counsel for Respondent Mercury Marine

DECEMBER 2001

[12] At the present time, boating accidents involving propellers are very rare. As the Subcommittee found, the "risk of fatality" from recreational power-boating is small in comparison to that of other activities, including other types of boating: estimated fatalities per each million activity hours were "1.26 for inflatables, 0.62 for canoes/kayaks, and 0.59 for rowboats, in each case with no engine being involved, compared to a risk of 0.14 from all causes for open motorboats (*within which the risk of propeller strike itself is a very small fraction*)." Ill. App. A11 (emphasis added).